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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1421

DENNIS G. MARTIN, Administrator of the Estate of HARRY EUGENE WALKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner's Reply to Defendant's Brief in Opposition to Petitioner's Writ of Certiorari.

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The United States' brief says there are two questions: The question (1) of contributory negligence; and the question (2) of "discretionary function."

This is not what the Court of Appeals said. The Court of Appeals said:

> "We conclude that our decision on the [discretionary exemption] issue makes unnecessary deciding the others although comment on some other questions is necessary in a full discussion of the facts." [Pet. A-2.]

Quite obviously, the respondent Government wishes to down-grade, even by-pass, the "discretionary exemp-

tion" holding of the court below. The irony is that if this Court is persuaded not to grant a hearing because of contributory negligence, an issue factually determined by the trial court in favor of petitioner, the result will be to enlarge the discretionary exemption loophole in the Federal Tort Claims Act to the point where:

> ". . . it is difficult to perceive which duties under tort law could not be avoided . . . counter to the Supreme Court's admonition that such exception to this remedial law be narrowly construed."
>
> [*Smith v. United States* (10th Cir. Dec. 27, 1976), 546 F.2d 872, 977.]

Secondly, respondent's brief states, at page 5:

> "The factual determination of contributory negligence constitutes an independent basis for the judgment below, and that determination plainly does not warrant review by this court."

It did not warrant review by the Court of Appeals. Now comes the Government and claims for the Court of Appeals the benefit of Rule 52 which it, the appellate court, should have accorded the trial court's findings. The Government thus wishes to establish, first, that the "clearly erroneous" rule should be diluted when applied to the trial court, but strengthened when applied to factual determinations made by the Court of Appeals. The policy and purpose of Rule 52 is just the opposite. This Court should not approve a holding below which permits the Court of Appeals to tinker at will with findings made at the trial level.

Thirdly, in its brief respondent Government asserts that the off-hand statements of a chambermaid should

be a substitute for warnings the Government should have given visitors [Respondent's Brief, pp. 2, 3, and 5]. The Searer quote [Respondent's Brief, p. 3] is out of context. Searer's expostulation referred to thermal features, not grizzly bears. The full quote by Vikki Searer was:

> "I told them when we were walking up to their camp that they were awfully close to the geysers and that the ground [sic] around the geysers were unstable. And I told them that they were—I told them they really would catch hell if they got camping in an unauthorized campsite. . . ."
>
> [Searer Deposition, Ex. 2, in evidence, p. 15, lines 11-15.]

Searer didn't even know there was a grizzly danger near Old Faithful. She knew, with Harry Walker, that tourists were "stupid" to mingle with the bears at the bear jams [Searer Deposition, p. 33, lines 22-25; p. 24, lines 1-19]. Was the stupidity that of the tourists, or of the Park Service?

If hearing is denied, will not this case stand for the principle that even in aggravated cases, where the Government negligently takes chances with visitor safety, avoiding its standards of due care in performance, the Government has no duty to warn and can be taken off the hook by off-hand statements by the lowest concessionaire employee. See the startling comments by the court below, quoted at page 5 of Respondent's Brief.

The Government brief refers to the campsite as "an unauthorized and isolated place to camp near the Old Faithful geyser" [Respondent's Brief, pp. 2-

3]. The Court of Appeals also refers to the camp as "unauthorized." [Pet. App. p. A-11]. Yet the Government's pamphlet, "In Grizzly Country" [Exhibit 31] and expert Dr. Frank Craighead, both hold that the best and safest camping place in grizzly country is *not* at an established campsite, *not* on a trail, but at an off-trail place like the campsite chosen by the boys. The campsite permit system was for a different purpose; it was to prevent overcrowding of campsites and to "enable the issuing ranger to know how many persons at any given time will be occupying a particular back-country campsite. . . ." [Exhibit 44, Memorandum from Chief Park Ranger to District Rangers and Specialists, Nov. 3, 1971, p. 2]. The institution of this system was to commence "by July 1, 1972," a week after Walker was killed [Exhibit 44, p. 2].

But this was not ordinarily grizzly country. This was Old Faithful. As the government, but no visitors, knew, this became grizzly country, for this short period, because the NPS program dispersed grizzlies from back-country to the visitor areas. Specifically, it was grizzly country for Harry Walker because the Park Service violated the advice of the Craighead Brothers, and of their own experts, and transplanted this particular bear, No. 1792, a distance all bear experts held to be inadequate to prevent the bear from returning. This was the bear that Harry Walker met as he walked through the forest at Old Faithful [Respondent's Brief, p. 6; Pet. App. A-10]. No bear experts supported the Government's negligent handling of this particular

bear. It is respectfully submitted that to allow the Court of Appeals' decision below to stand would be a blow to the usefulness of the Federal Tort Claims Act.

Conclusion.

It is prayed that the Writ of Certiorari issue.

Respectfully submitted,

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